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IN THE

Supreme Court of the United States

October Term, 1964

No. 270

JEROME ROSENBERG,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

INDEX

PAGE

Statement 1

Summary of the Facts 2

POINT ONE—The due process requirements of full and fair disclosure of all the facts surrounding the testimony of the witness Melville were fully satisfied 7

POINT TWO—Petitioner Rosenberg received a fair and impartial trial in full accord with due process of law 17

POINT THREE—Petitioner was not denied his right to confrontation under the Sixth Amendment 21

POINT FOUR—Petitioner was convicted by a fair and impartial jury chosen by the standards of due process of law 23

CONCLUSION 25

AUTHORITIES CITED

Cases

Blackburn v. Alabama, 361 U.S. 199 ..... 12, 15

Brady v. State of Maryland, 373 U.S. 83 8

Brown v. Allen, 334 U.S. 443 17

Brown v. Mississippi, 297 U.S. 278 12

Columbe v. Connecticut, 367 U.S. 568 16

Douglas v. Alabama, — U.S. —, 13 L ed 2d 934 ..... 21, 22

PAGE

Edwards v. People of the State of New York, 1 L. ed., 2d 17, 76 S. Ct. 1058 24

Hayes v. Missouri, 120 U.S. 68 25
Hysler v. Florida, 315 U.S. 411 15

Jackson v. Denno, 12 L. ed. 2d 908 11
Jones v. United States, 362 U.S. 257 14

Ker v. California, 374 U.S. 23 14

Lanza v. New York, 370 U.S. 139 17

Maddox v. United States, 156 U.S. 237 12
Malloy v. Hogan, 377 U.S. 1, 12 L. ed. 2d 653 ....12, 13, 14
Mooney v. Holahan, 294 U.S. 103 8

Napue v. Illinois, 360 U.S. 264 8

On Lee v. U.S., 343 U.S. 747 14
Opper v. United States, 348 U.S. 84 21

People v. Becker, 210 N.Y. 274, 104 N.E. 396 18
People v. Cashin, 259 N.Y. 434, 182 N.E. 74 18
People v. Chapman, 224 N.Y. 463, 121 N.E. 381 18
People v. Creasy, 236 N.Y. 205, 140 N.E. 563 6
People v. Crum, 272 N.Y. 348, 6 N.E. 2d 51 6
People v. Eckert, 2 N.Y. 2d 126 3
People v. Fazio, 14 N.Y. 2d 716 8
People v. Guardino, 286 N.Y. 132 21
People v. Harris, 306 N.Y. 345 3
People v. Kerrigan, 147 N.Y. 210, 41 N.E. 494 18
People v. Klvana, 241 N.Y. 481 20
People v. Leyra, 302 N.Y. 353, 98 N.E. 2d 553 6
People v. Lobell, 298 N.Y. 243 21
People v. Ludkowitz, 266 N.Y. 233, 194 N.E. 688 18
People v. Mangi, 10 N.Y. 2d 86 8
People v. Mendes, 3 N.Y. 2d 120, 143 N.E. 2d 801 18
People v. Nelson, 189 N.Y. 137, 81 N.E. 768 6
People v. Peller, 291 N.Y. 438, 52 N.E. 2d 949 6
People v. Razezicz, 206 N.Y. 249 3

PAGE

People v. Richardson, 251 A.D. 916 20
People v. Robertson, 12 N.Y. 2d 355 8
People v. Savvides, 1 N.Y. 2d 554 8
People v. Sherlock, 166 N.Y. 180, 59 N.E. 830 ..... 6, 18
People v. Waterman, 9 N.Y. 2d 561 16
People v. Zimmerman, 10 N.Y. 2d 430 8
Pointer v. Texas, — U.S. —, 13 L ed 2d 923 ..... 21, 22
Pyle v. Kansas, 317 U.S. 213 8

Rochin v. California, 342 U.S. 165 .....13, 14, 16
Rogers v. Richmond, 365 U.S. 534 15

Spano v. New York, 360 U.S. 315 11

Turner v. Louisiana, 379 U.S. 466 21

United States ex rel. Meers v. Wilkins, 2nd Cir. 326 F. 2d 275 8

Walter v. People, 32 N.Y. 147 24

New York Code Criminal Procedure

Code of Criminal Procedure, Section 371 24
Code of Criminal Procedure, Section 372 24
Code of Criminal Procedure, Section 528 18

United States Constitution

Fifth Amendment 13
Sixth Amendment 21
Fourteenth Amendment 2

New York Constitution

Art. 6 Sec. 7 6

Miscellaneous

8 Wigmore Evidence, sec. 2184a, p. 50, McNaughton Rev. 1961 14

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No. 270

JEROME ROSENBERG,

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THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, unanimously affirming the judgment of the Supreme Court of the State of New York, County of Kings, convicting him of the crime of Murder in the First Degree.

Petitioner had been convicted by verdict of the Jury of the crime of felony murder, without a recommendation for life imprisonment under the New York Penal Law, Section 1045-a.

The opinion of the Court of Appeals of the State of New York is reported in 15 N.Y. 2d 235.

The judgment and warrant of death against petitioner had been duly stayed on April 19, 1965, by the Chief Judge of the Court of Appeals of the State of New York, pending the hearing and determination of this petition for certiorari

On April 22nd, 1965, the Court of Appeals of the State of New York duly amended its judgment to provide that no constitutional rights of the petitioner had been violated under the Fourteenth Amendment of the Constitution of the United States.

Summary of the Facts

The petitioner, Jerome Rosenberg, and his co-petitioner, Anthony Portelli were convicted of felony murder without a recommendation for mercy, and sentenced to death on February 18, 1963, after a trial by Jury before Honorable Samuel S. Leibowitz, a Justice of the Supreme Court of the State of New York, County of Kings (171, 183).*

The indictment charged the petitioners, Portelli and Rosenberg, acting in concert with one Anthony Dellernia,** with Murder in the First Degree in the killing of two detectives, Luke Fallon (First Count), and John Finnegan (Second Count), during the commission of a robbery of a tobacco shop on May 18, 1962. Each of the petitioners was armed with a loaded gun. The slain detectives had been on taxicab patrol duty with the 78th Police Squad at the time of the homicide.

---

* Numerals refer to folio numbers in printed record on appeal.

** A mistrial was declared as to the co-defendant, Dellernia (3563-4). He was retried subsequent to the conviction of the petitioners and was acquitted.

Guilt of each of the co-petitioners, Rosenberg and Portelli, had been established beyond a reasonable doubt. Both of them were doubly identified by David Goldberg and Robert Goldberg, the proprietors of the tobacco shop, as the perpetrators of the killing during the course of the robbery.

Apart from the direct evidence of the identification, the invincible circumstantial evidence adduced against them was such as to exclude to a moral certainty every other reasonable hypothesis than that of their guilt (*People* v. *Razezicz,* 206 N.Y. 249; *People* v. *Harris,* 306 N.Y. 345; *People* v. *Eckert,* 2 N.Y. 2d 126). Thus, as to the petitioner Rosenberg:

• Rosenberg was positively identified by a witness who confronted him face to face, as he ran towards her from the tobacco shop immediately after the commission of the crime (1139-40).

• Rosenberg's hat (Peo. Ex. 26) and his sunglasses (Peo. Ex. 27) were found in an ashcan near the scene of the robbery, along the path of his flight from the tobacco shop.

• It was conclusively established that the hat had been purchased by Rosenberg a week before the robbery at Joe Silver's Haberdashery Store.

• The sunglasses had been loaned to Rosenberg by the witness, Louis Ferrara, at about 2:00 P.M. of the day the robbery was committed. These glasses were distinctively identified by Ferrara's nickname, "Gee", scratched on the inside left earpiece.

• A corroborating witness, Linda Manzione, testified that at 3:00 P.M. of the day of the robbery— barely a half hour before the crime had been committed—she saw Rosenberg and Portelli put the sunglasses and dark hats on as

they left Dellernia's car at 78th Street and New Utrecht Avenue, when Dellernia said, "I'll leave you off here because I don't want to get mixed up in anything" (2679-82).

• She identified People's Exhibits 26 and 27 as similar to the hats and sunglasses she had seen on the petitioner's person at that time (2682-7, 2742).

• As to the .32 Colt Automatic Gun (Peo. Ex. 19), which had been found in a flower bed behind a hedge along the path of Rosenberg's flight from the tobacco shop, Linda Manzione testified that she had seen the very same gun about two weeks before, in Rosenberg's hands, when she observed him loading it with bullets (2649, 2670).

• Again, at 2:00 P.M. of May 18, 1962, the day of the homicide, she had seen Rosenberg walk behind the counter of Dellernia's candy store, and while facing her, she saw the gun slip out of a folded newspaper which he took from the shelf.

• Robert Goldberg testified that, as an experienced ordinance man in the Marine Corps, he recognized the gun in Rosenberg's hand as an automatic, and that it was similar to the weapon used in the tobacco shop robbery (894-899).

• The bullet which was recovered from the ceiling of the tobacco shop was of 32-calibre. It was Rosenberg who had himself informed Robert Goldberg, after a shot was fired, that "the gun went off accidentally" (912-914). Test firings of the .32 Colt Automatic established that the bullet extracted from the ceiling was definitely fired from that weapon (1897-1905), and that the discharged shell found on the floor of the tobacco shop shortly after the homicide had been fired from the same automatic (1908-11, 1928).

• Louis Ferrara testified that at 10:30 A.M. on the day of the robbery, he had overheard a conversation between petitioner and Anthony Dellernia in which Rosenberg mentioned the word "score", meaning a robbery (2154-5).

• A short time later, at about 10:55 A.M., he saw Rosenberg and Portelli with each other right next to Dellernia's candy store.

• Among other salient aspects of the circumstantial proof, it was established by witnesses outside the tobacco shop immediately after the shooting had occurred, that the persons running from the scene of the homicide fairly fitted the two defendants' physical description and attire.

• Max Graup, a resident of that vicinity, saw a slim man, about 5 feet, 6 inches in height (fitting petitioner's description) running out of the tobacco shop shortly after hearing a sound like "three firecracker shots". The man wore a black hat, black shoes and dark glasses; there was a gun in his right hand as well as a spotted red rag (785-797); and the man had been running along the path where these items of evidence were found shortly after the homicide (791-2).

• Likewise, two young school boys observed two persons running from the scene, fitting the defendants' description, shortly after they heard a sound like "firecrackers" (836-841, 860-2).

• The two Goldbergs both observed that Rosenberg had held a white cloth with a red ink stain on it, which Rosenberg had used to cover his face during the course of the robbery (612-613; 914-917).

A red ink-stained white towel had been discovered in the ashcan together with Rosenberg's hat and the sunglasses. The towel was identified as one exclusively belonging to the tobacco shop, containing a special red dye used for the cigarette tax machine of the Boro Park Tobacco Shop (1493-1504, 1511-23).

Neither petitioner, nor Portelli, took the stand in their own defense.

The judgment of conviction had been unanimously affirmed by the New York Court of Appeals under its plenary right and power to review issues of law and fact in a capital case "whether any exceptions shall have been taken or not in the Court below", as mandated by *New York Const. Art 6 Sec. 7* and *New York Code Crim. Pro. Secs. 517 and 528* (*People* v. *Sherlock,* 166 N.Y. 180, 59 N.E. 830; *People* v. *Nelson,* 189 N.Y. 137, 81 N.E. 768; *People* v. *Creasy,* 236 N.Y. 205, 140 N.E. 563; *People* v. *Crum,* 272 N.Y. 348, 6 N.E. 2d 51; *People* v. *Peller,* 291 N.Y. 438, 52 N.E. 2d 949; *People* v. *Leyra,* 302 N.Y. 353, 98 N.E. 2d 553).

POINT ONE

The due process requirements of full and fair disclosure of all the facts surrounding the testimony of the witness Melville were fully satisfied.

I

The New York Court of Appeals held at bar:

> *"Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury.* (See 3 Wigmore, Evidence (3d ed., 1940), Sec. 815, pp. 230-231). *The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.*
>
> *In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct."*

The due process test applicable to the testimony of a witness is that of full and fair disclosure of all the facts affecting his credibility. (*Mooney* v. *Holahan,* 294 U.S. 103, 112; *Pyle* v. *Kansas,* 317 U.S. 213; *Napue* v. *Illinois,* 360 U.S. 264; *Brady* v. *State of Maryland,* 373 U.S. 83; *United States ex rel. Meers* v. *Wilkins,* 2nd Cir. 326 F. 2d 275, 282; *People* v. *Savvides,* 1 N.Y. 2d 554; *People* v. *Zimmerman,* 10 N.Y. 2d 430; *People* v. *Mangi,* 10 N.Y. 2d 86; *People* v. *Robertson,* 12 N.Y. 2d 355; *People* v. *Fazio,* 14 N.Y. 716.

After testifying that he had been beaten by the police before disclosing to them that Portelli had made a detailed confession of the crime to him, Melville unequivocally told the jury at the trial that his testimony was the absolute truth, as was the testimony that he had given to the Grand Jury (1759-60).

Likewise, Fernanda Melville, his wife, affirmed the truthfulness of her testimony before this jury, notwithstanding her statement that she had previously been in fear regarding their involvement in this case (2482-90).

The District Attorney, in his summation, told the jury:

> "We come to Richard Melville and to Richard Melville's wife Fernanda. He testified that when he was in the precinct on Sunday night at about 10:30, he was beaten; he was kicked; he was assaulted with cigarette butts held by the police and put to the back—to his back; that he was in such pain and in such suffering—I don't condone those actions. I don't condone them on the part of the police or anyone else, and particularly, the police. It is an absolute outrage in these times where people have to be subjected to that practice and to that conduct, to go through that pain and suffering by these police.

> Notwithstanding their enthusiasm, notwithstanding their eagerness to get the proper defendant, they had no business to do that which was described by Melville, and it shall not rest here either. But yet, during the two and a half hours of these pains and these sufferings through which this man experienced, he said he didn't know Portelli. He said he didn't know Rosenberg, and he said he didn't know Dellernia.
>
> But the fact of the matter is that he knew Portelli and for two and a half hours he denied that he knew him. So when he admitted under this pain and this assault by the cops upon him, he admitted that he knew Portelli, and the fact remains that defense counsel, in putting this woman on the stand, Mrs. Frankolino, she admits that she knew Portelli, and that her brother Frank Lino was a friend of Portelli" (3921-4).

And the Court, training the searchlight of truth on the credibility of the witness, forthrightly charged the jury as follows:

> "Now the question is, did he confess to Melville? What about Melville? Who is Melville? What is his background? He is an ex-convict. He is a bookmaker living outside of the pale of the law. He is a no good loafer. I wouldn't trust him further than I could 'throw a stick,' based on his background. Now I can't be any more forthright than that, can I? I wouldn't 'convict a dog' on his testimony, standing alone, much less a human being, unless there was other evidence which backed up his story, which bolstered his credibility. Do you understand what I am saying—unless there was other evidence in the case which backed him up, evidence that I believed beyond a reasonable doubt" (4145-6).

* * * and further, at fols. 4149-54:

"Now what happened to Melville? He tells us that the police grabbed him at about 10:30 P.M. on May 21st, and took him in for questioning; that he was asked if he knew the defendants; if he knew Portelli, if he knew Rosenberg, if he knew Dellernia. He said, 'I don't know these people.' He said that he lied about it, that he lied to the police; that he kept his mouth shut about knowing these people, and although they gave him an unmerciful beating, which would do credit, if I can call it 'credit,' to a gestapo wretch in Hitler's camps; although they gave him an unmerciful beating, he would not open up and say that he knew these people. Even when John Dellernia was on a bed in a bedroom, being 'given the works,' as they say by the cops, when John Dellernia identified Melville, Melville refused to say that he knew John Dellernia. He stood pat; but finally he couldn't stand the pain any more. He couldn't stand the torture, and he opened up. Then the story was told.

What about Melville's beating, which he undoubtedly received at the hands of the police, which is reprehensible. I suppose, as you and I sat here in this courtroom and listened to this tale, we were nauseated; at least I was nauseated, and as Assistant District Attorney Selzer so forthrightly stated, these cops, who gave this man a beating in that station house, deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort, and I believe that the District Attorney was correct in appraising the conduct of these men in the manner that Mr. Selzer did, and in the manner that the other attorneys did too. But what about his testimony? Is his testimony to be ruled out, to be dis-

> regarded just because the cops gave him a beating, and for no other reason?
>
> The answer to that question is no. It would be different if a defendant were coerced, and they tried to use a confession against him. Then the law is simple. Then that statement of his would never reach the ears of a jury. But the law is different in the case of a witness, and the jury may consider the beating, and determine whether or not, in spite of the beating, he came in here and he told the truth as to what happened between him and Portelli in his house on that Sunday until Portelli allegedly left in the car to skip to Chicago.
>
> I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

Thus, unlike the cases dealing with coerced confessions of an accused, all bearing the imprint of an "inherent untrustworthiness" (*Spano* v. *New York,* 360 U.S. 315, 320-321) and "probable unreliability" (*Jackson* v. *Denno,* 12 L. ed. 2d 908, 921), Melville's testimony was vested with the imprimatur of credibility under the careful and circumspect instructions of the trial court.

What is decisive as to the due process claim by petitioner is that the witness' testimony as such in no way violated petitioner's right against self-incrimination, for Portelli's confession to the witness was indisputably voluntary and uncoerced.

Hence, this is not a case where the State "wrings a confession out of an accused against his will" (*Blackburn* v. *Alabama,* 361 U.S. 199); or deigns to "prove a charge against an accused out of his own mouth" (*Malloy* v. *Hogan,* 377 U.S. 1, 12 L. ed. 2d 653, 659); or infringes in the slightest degree on the irretractable principle of criminal justice that "the rack and torture chamber may not be substituted for the witness stand." (*Brown* v. *Mississippi,* 297 U.S. 278).

The underlying fallacy of petitioner's argument is that it is hoisted on the entirely erratic premise that Melville's testimony was "coerced testimony" (Pet. Br. p. 15), which it decidedly was not. Quite to the contrary, Melville's *testimony* was wholly voluntary on the witness stand.

It was testimony given under the aegis and protection of the trial Court, with every sanction of cathartic cross-examination available to the petitioner.

Thus, unlike the vicarious impact of admissions resulting from a coerced confession wrung from an accused, this was the uncoerced and direct testimony of a witness given under entirely wholesome credentials of reliability.

In the words of this Court, in *Maddox* v. *United States,* 156 U.S. 237, 242-3, it was testimony which fully satisfied every standard of a fair trial, including

> "* * * *a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*"

This Court's recent decision in *Malloy* v. *Hogan*, 377 U.S. 1, 12 L. ed. 2d 653, is dispositive of the constitutional issue. In *Malloy*, this Court enunciated the new basic constitutional doctrine that the admissibility of a coerced confession in a State criminal prosecution shall be tested not by the due process clause, or "whether the conduct of State officers in obtaining the confession was shocking", but rather, by the standard of the Fifth Amendment's command against self-incrimination.

If, then, as to an *accused*, "the constitutional inquiry is not whether the conduct of state officers in obtaining a confession is shocking, but whether the confession is free and voluntary * * * —in other words, the person must not have been compelled to incriminate himself"—then it logically follows that testimony of *a person other than an accused individual* cannot be constitutionally objected to on that ground, because no right against self-incrimination has been violated.

Accordingly, applied to Melville's testimony, the constitutional inquiry is not as to whether the conduct of the police in obtaining the evidence was "shocking", but solely whether the witness' testimony was given freely and voluntarily, with all-out disclosure to the jury of all the relevant facts, so as to assure to petitioner an absolute fair trial under procedural due process of law.

Rochin v. *Calfornia*, 342 U.S. 165, patently enough, is plainly inapposite. There, the victim of the constitutional deprivation of due process was the *accused* on trial, and not a witness as here.

There, unlike here, the forcible extraction of incriminating evidence from the stomach of the accused—which the

Court properly denounced as "conduct that shocks the conscience"—directly violated the constitutional right *of the accused* against compulsory self-incrimination (*See concurring opinion of Mr. Justices Black and Douglas; Malloy* v. *Hogan, supra*).

Thus, within its own consensus, the reach of *Rochin* cannot constitutionally apply to the situation at bar.

II

In any view of this case, petitioner is utterly without legal standing to urge upon this Court that the insidious tactics practiced by the police against the witness rendered his testimony constitutionally inadmissible.

Directly analogous here is the constitutional proscription against unreasonable searches and seizures, available only as to one "who has standing to complain" (*Jones* v. *United States,* 362 U.S. 257; *Ker* v. *California,* 374 U.S. 23).

The right to due process of law is one personal to the accused. "The rule (*Rochin* v. *California, supra*), does not apply unless the person upon whom the atrocity was committed is the defendant on trial" (*8 Wigmore Evidence, sec. 218a, p. 50, McNaughton Rev. 1961*).

Comporting with our position herein, petitioners made no objection to the admissibility of Melville's testimony, nor did they take exception to the Court's instructions thereon. (See *On Lee* v. *U.S.,* 343 U.S. 747, footnote 3).

III

There is a complete absence of any authority for the proposition urged upon this Court that coercion practiced upon a witness should be equated to the rule governing the admissibility of out-of-court confessions extracted from an accused.

As a practical matter, there is no rational basis for such equation in view of the fundamental differences inhering between the two types of testimony, as already aforenoted.

Again, petitioner's argumentative projection at bar, if ever adopted, could not but lead to results gravely inimical to the public interest and to the sound administration of criminal justice.

The great climactic quest for truth in the judicial process would be seriously compromised in the chaotic shuffle of endless *voir dire* examinations pervading criminal trials.

Consistent with the rote common to coerced confessions generally, the range of inquiry would likewise have to embrace all patterns of coercion: physical violence as well as the "more sophisticated modes of persuasion" (*Blackburn* v. *Alabama,* 361 U.S. 199; *Rogers* v. *Richmond,* 365 U.S. 534; *Hysler* v. *Florida,* 315 U.S. 411, 413).

The broad judicial inquiry would perforce have to apply to sundry testimony from witnesses of diverse nature, whether testifying to a confession as here, or to such other material issues as a disputed identification, or the corroboration of an accomplice, or to matters in rebuttal for the prosecution, among all others.

Typically illustrative of the intolerable stresses to which the judicial process would thus be subjected would be the very case at bar, where practically every one of the People's major witnesses (Louis Ferrara, Linda Manzione, Fernanda Melville, Richard Melville, David Goldberg, Robert Goldberg) would have had to run the gauntlet of *voir dire* examination as to the "competency" of their testimony by advance ruling of the trial court, as had been urged by the petitioner in the Court below.

The demands of due process should not be so stretched as to impose intolerable standards on the fair conduct of a criminal trial, or to fasten "fetters of unreason upon the States" (Mr. Justice Frankfurter, in concurring opinion, *Adamson* v. *Calif.*, 332 U.S. 46).

> *"The problem is that of achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other."*
>
> *People* v. *Waterman*, 9 N.Y. 2d 561.

In *Columbe* v. *Connecticut*, 367 U.S. 568 at p. 588, the Court stated:

> *"Due process does not demand of the states, in their administration of the criminal law, standards of favor to the accused which our civilzation, in its most sensitive expression, has never found it practical to adopt."*

In *Rochin*, this Court laid down the guiding principle, at p. 168:

> *"Due process of law * * * is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice".*

And at p. 172:

> *"Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355, 52 L. ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560, *on a judgment not ad hoc and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society".*

POINT TWO

Petitioner Rosenberg received a fair and impartial trial in full accord with due process of law.

Petitioner Rosenberg's contention that he was denied a fair trial is utterly without support in this record. We are certain that the wild and intemperate diatribe against the trial Court will merit no approval in this Court, any more than it did in the New York Court of Appeals below. The State's resolution of this issue should be accorded the finality it is due (*Brown* v. *Allen,* 334 U.S. 443; *Lanza v. New York,* 370 U.S. 139).

The plenary right to review by the Court of Appeals as to all matters affecting a fair trial in a capital case is mandated by Section 528, Code of Criminal Procedure, which provides:

> "* * * *When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below".*

The Court's tender regard for the fair trial rights of an accused is enshrined in a long line of decisions. See *People* v. *Kerrigan,* 147 N.Y. 210, 41 N.E. 494; *People* v. *Sherlock,* 166 N.Y. 180, 59 N.E. 830; *People* v. *Chapman,* 224 N.Y. 463, 121 N.E. 381; *People* v. *Becker,* 210 N.Y. 274, 104 N.E. 396; *People* v. *Ludkowitz,* 266 N.Y. 233, 194 N.E. 688; *People* v. *Cashin,* 259 N.Y. 434, 182 N.E. 74; *People* v. *Mendes,* 3 N.Y. 2d 120, 143 N.E. 2d 801.

The petitioner's claims addressed to the alleged unfairness of the trial judge are wholly chimerical in nature, without any support whatever in the printed record on appeal. Further, it should be here noted that the petitioner's appellate counsel did not represent him upon the trial nor was he present at any stage of the proceedings, and is therefore incompetent to assay the alleged unfairness of the trial beyond the trial record. In fact, the record is devoid of any intimation by exception or otherwise on the part of defense counsel that the Court's instructions to the jury, or its conduct of the trial, were in any way prejudicial to them.

One cannot, therefore, rationally reconcile the petitioner's semantical manipulations and vituperative assault against the conduct of the trial Court with the demonstrated fairness shown to the accused throughout the trial.

In many notable instances, the trial Court manifested a fairness to the accused which in truth spilled over beyond the call of judicial duty. To take some examples at random:

• The Court insisted that Portelli be given an opportunity to call an additional fingerprint expert, and to adjourn the trial for such purpose, after it had developed that his own expert witness had given the surprise testimony that the fingerprint check found on the check was actually that of Portelli (3348-3354).

• The trial judge, on his own initiative, although without objection by defense counsel, rejected a prospective juror for cause, on the basis of his admission that he would be influenced by a detective-relative of his against the defendants on trial (Voir dire Jury, p. 703).

• The trial judge interjected himself in the District Attorney's summation—again without prodding by defense counsel—to dispute the prosecutor's statement to the jury that Rosenberg had been identified by Robert Goldberg. Said the Court at that point (3872):

> "The Court: There is no such testimony, and there has been no objection, but the Court is entering an objection. The Court is entering an objection to your statement that at that time he saw the full face of this defendant. If counsel don't object, the Court objects. You are in error about the evidence on that point."

• In the Court's instructions to the jury, the trial judge flatly stated that only David Goldberg had identified Rosenberg (4069), while the record showed that Robert Goldberg did in fact also identify Rosenberg (901-2, 906-910, 1036-7), and was permitted to make a courtroom identification thereon.

• Following the mistrial as to Dellernia, the trial Court directed that certain important testimony against Rosenberg be stricken from the record, thus giving to the accused a ruling more favorable than that to which he was entitled. (See *People* v. *Klvana,* 241 N.Y. 481, 485; *People* v. *Richardson,* 251 A.D. 916.) For example, the testimony as to the purchase of the murder weapon by Dellernia at Aberdeen, Maryland, under the fictitious name of "Romano" was ruled out of the trial, to petitioners' undue advantage, in the Court's instructions to the jury (4158); again, the evidence of Louis Ferrara that the Rosenberg gun had been placed under the mat of the Dellernia car several hours before the shooting took place on May 18, 1962 was likewise ordered stricken from the Record (3702).

• In contrast, the Court directed that the testimony of the alibi witnesses for Dellernia be considered by the jury "as bearing upon the credibility of Linda Manzione," who had testified that she was together with Dellernia at the time the robbery was committed, as against the testimony of the alibi witnesses that they had been with Dellernia elsewhere at that time (4040-4047).

• The Court set up a solid steel ring of instructions around the credibility of the witness Melville, saying at folio 4146:

> "I wouldn't 'convict a dog' on his testimony, standing alone, much less a human being, unless there was other evidence which backed up his story, which bolstered his credibility. Do you understand what I am saying—unless there was other evidence in the case which backed him up, evidence that I believed beyond a reasonable doubt."

And again at folio 4154:

> "I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

In all, the petitioners had been accorded a completely fair and impartial trial. The fancied accusations against the honor and judicial integrity of the trial judge are simply without basis in the record or otherwise, and should be summarily rejected by this appellate tribunal—just as they were plenarily rejected by the New York Court of Appeals.

POINT THREE

Petitioner was not denied his right to confrontation under the Sixth Amendment.

Although petitioner's defense counsel had not objected to the damaging testimony of Melville that Portelli had told him that he (Portelli) took the money out of the cash register, and that "Jerry took the rest" (1563), the trial Court immediately instructed the jury in the most positive

terms that that evidence was not binding on Rosenberg. In addition, the Court polled the entire jury to assure absolute compliance with the Court's instructions on that issue (1563-1579).

It is petitioner's submission to this Court that "the admonition to the Jury that Portelli's admissions were not binding as to Rosenberg were not only intrinsically ineffective but in fact seemed to have been unmistakeably calculated to accomplish exactly the opposite * * *". (Pet. Br. p. 26)

The petitioner's position is wholly untenable. The Court's emphatic, cautionary instructions to the jury circumscribing Melville's testimony insofar as the petitioner Rosenberg had been implicated, effectively protected the petitioner's right to a fair trial.

"Our theory of trial relies upon the ability of a jury to follow instructions" (*Opper* v. *United States,* 348 U.S. 84; *People* v. *Lobell,* 298 N.Y. 243, 254; *People* v. *Guardino,* 286 N.Y. 132, 135).

In this connection, the petitioner invokes this Court's recent decisions in *Pointer* v. *Texas,* — U.S. —, 13 L ed 2d 923, and *Douglas* v. *Alabama,* — U.S. —, 13 L ed 2d 934.

In the light of the record of this trial, however, it would be sheer sophistry to contend that the right of cross-examination "in exposing falsehood and bringing out the truth" (*Pointer* v. *Texas, supra*), was in any way impinged or impaired. Here, there was "full judicial protection of the defendant's rights of confrontation, of cross-examination, and of counsel" (*Turner* v. *Louisiana,* 379 U.S. 466, 472-3).

In short, the *Douglas-Pointer* decisions of this Court are totally inapposite, for the Confrontation Clause of the Sixth Amendment was in no way here even remotely violated. Full opportunity of cross-examination was afforded to the two defendants on trial. The circumspect instructions of the trial Court adequately served to guarantee to petitioner a fair trial free from error or prejudice.

POINT FOUR

Petitioner was convicted by a fair and impartial jury chosen by the standards of due process of law.

The record of the trial lends no support whatever to petitioner's claim that he had been denied a trial by a fair and impartial jury, and of "a fair due process opportunity to receive a jury recommendation of mercy upon a conviction of felony murder" (Pet. Br. p. 4).

Nor is there any substance to petitioner's claim that the trial jury was selected by "an unconstitutional procedure aimed at excluding persons who might have a truly objective attitude about a recommendation of mercy, and, specifically aimed at excluding persons of the same ethnic or racial background as the respective defendants" (Pet. Br. p. 4).

The detailed transcript of the *voir dire* examination of the jury, to which we respectfully commit this Court, completely negates this spurious and unfounded charge.

Certainly it was the plain right and duty of the Court and prosecutor to weed out "for principal cause" all those who had expressed or indicated conscientious scruples against the death penalty, and to exclude those who could not con-

scientiously apply the stringent law of felony murder (*Walter* v. *People*, 32 N.Y. 147).

This same procedure in the selection of a jury in a capital case was found to present "no tenable due process question" in the capital case of *Edwards* v. *People of the State of New York*, 1 L. ed., 2d 17, 76 S. Ct. 1058.

Petitioner does not, and indeed cannot, point with particularity to any instance where Jewish and Italian jurors were explicitly and deliberately excluded on account of nationality or race. Nor can petitioner cite any instance of a single juror actually selected over the objection of defense counsel on that score or otherwise. Nor can petitioner point to a single instance in the entire *voir dire* where a prospective juror had been particularly questioned as to his views regarding possible leniency or recommendation in connection with a verdict of felony murder.

The fact is that when the jury had been finally selected, defense counsel had still unused one of its remaining peremptory challenges; and defense counsel had in fact expressed themselves as satisfied with the jury as selected (252-3).

The record of the *voir dire* is thus completely devoid of any objection of the tenor so stridently and belatedly urged upon this reviewing Court: (Code Crim. Pro. Sec. 371).

Petitioners' fanciful interpolations in connection with the peremptory challenges exercised by the People are without legal force whatever. The right of peremptory challenge by both prosecution and defense is one absolute in nature, *"for which no reason be given"* (*Code Crim. Pro. Section* 372).

As was held in *Hayes* v. *Missouri*, 120 U.S. 68, at p. 71:

> *"The right to challenge is the right to reject, not to select a juror. If, from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."*

The Court of Appeals of the State of New York has found no violation of constitutional right.

CONCLUSION

The petitioner has been duly convicted under due process of law.

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
July, 1965.

Respectfully submitted,

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